

E. T. ENTERPRISES,)	AGBCA No. 2006-139-ADR
)	
Appellant)	
)	
Representing the Appellant:)	
)	
Edward T. Leonard, President)	
E. T. Enterprises)	
1043 Grand Avenue, Unit 227)	
Saint Paul, Minnesota 55105)	
)	
Representing the Government:)	
)	
Azine Farzami, Esquire)	
Office of the General Counsel)	
U. S. Department of Agriculture)	
Room 3311, South Building)	
1400 Independence Avenue, SW)	
Washington, D.C. 20250-1400)	

DECISION OF THE BOARD OF CONTRACT APPEALS

March 30, 2006

Opinion by Administrative Judge VERGILIO.

On February 24, 2006, the Board received the underlying appeal filed by E. T. Enterprises, of Saint Paul, Minnesota (contractor). The respondent is the U. S. Department of Agriculture (USDA or Government). Under a contract, No. 53-3A94-04-15, with the USDA, Food Safety and Inspection Service (FSIS), the contractor is providing a driver(s) to drive the Food Safety Education (FSE) recreational-style motor vehicle to various food safety education events or meetings. A contract dispute arose regarding the interpretation of the contract, specifically regarding the Government's obligations to compensate the contractor during weeks that the contractor is not driving or assisting with the vehicle. The contractor submitted a written request for an interpretation and decision. The contracting officer issued an interpretation that precludes reimbursement during the weeks that the vehicle is idle. The contractor here seeks a Board interpretation of the contract.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended. With its notice of appeal the contractor states that

the approximate amount ultimately in dispute is \$54,900. It elected accelerated procedures, 41 U.S.C. § 607(f). No monetary claim has been presented to the contracting officer. As discussed during the initial telephone conference in this matter, the parties agree that the monetary claim is not before the Board. Further, the parties agreed to utilize an alternative dispute resolution (ADR) technique, with the presiding judge to issue an interpretation of the contract that is binding upon the parties; therefore, the case is not resolved under accelerated procedures. In addition to the contract and amendments thereto, the parties provided other documents to be considered as well as written factual and legal summaries and explanations. During a telephone conference held on March 29, discussion occurred regarding the contract and dispute. The presiding judge stated the binding contract interpretation that is here reduced to writing, with only a summary of the surrounding facts.

Through a competed, negotiated procurement, the Government identified the scope of work under the contract as “a requirement for a driver(s) to drive the USDA, FSIS, FSE recreational-style motor vehicle for extensive, year-round travel throughout the continental United States (U.S.) to various food safety education events/meetings.” The contract specifies contractor/driver responsibilities, including:

1. The driver(s) will be responsible for driving the vehicle full-time for the base year throughout the continental U.S.
4. The driver must provide all liability insurance as required by this contract.
8. Driver(s) shall maintain time sheets and submit monthly with invoice. Contractor will only be reimbursed for actual hours worked.
25. Driver(s) shall maintain records of all hours worked (timesheets), travel expenses (lodging, meals, rental cars, taxis, tolls, etc.) and vehicle maintenance expenses records and submit to the Contracting Officer on a monthly basis.
29. Driver will be entitled to one week of paid leave per month.

Special contract provisions include the following:

H.6 Materials (Other Direct Costs) Reimbursement

- a) Materials are those direct costs other than labor that a contractor incurs in performing the requirements of the contract. These direct costs may include lodging, per diem (meals), gasoline, tolls, parking fees, repairs to the RV, and cleaning supplies.

- f) The contractor shall be reimbursed \$350 per day with a three day minimum, during the one week of paid leave per month. This rate includes the costs for training, salary, overtime, taxes, meals and incidental expenses.
- g) A paid trip home, or equivalent, once a quarter.

H.7 Labor Reimbursement

- a) The direct labor hours are fixed hourly rates that include wages, overhead, general and administrative expenses, and profit.
- b) Labor will be reimbursed at the rates established in the pricing schedule. Contractor must submit time sheets, which clearly indicate[] the number of hours worked for each proposed labor rate.

The contract, as awarded, includes line items for the base period (initial contract year), the first option year (the current period in which this dispute arose), and subsequent option years. For the base period and each subsequent option year, there are line items for a per week driver rate, an hourly overtime driver rate, and a weekly back-up driver rate. The purchase order associated with the initial award identifies 48 weeks for the driver line item, with the associated weekly rate. As applicable to the option year here at issue, line item 201 is for a driver rate. This is a per week rate, not an hourly rate. The driver overtime rate is hourly for over 8 hours a day or 40 hours per week. The back-up driver rate is on a per week basis. During the option year, the Government issued a unilateral change order increasing the contractor's duties and the weekly payment to the contractor: "The contractor will be compensated an additional \$350 per week for these duties in addition to the regular salary rate under Contract Line item 201."

The contracting officer issued a contract amendment, with a stated effective date of January 6, 2006. This is not identified as a unilateral amendment; the contractor has not signed the amendment. The amendment states that due to budgetary constraints, the Government will not start a regular event schedule until May 22, 2006. "From January through May 22, on occas[ion], the Food Safety Education Staff [FSES] may have a need for [the contractor] to drive and assist with local events or media opportunities. FSES expects that [the driver] or a back-up driver be available. FSES will provide a 14-day advance notice prior to these occasions." The Government has not utilized the vehicle this year.

The contract incorporates time and materials clauses and provisions. The Government maintains that it is not obligated to pay the contractor during the period in and after January 2006 when the contractor is not driving (or otherwise assisting with) the vehicle. The Government contends that payment obligations for time and materials are not accruing, as the contract must be viewed strictly as a time and materials contract (the contractor has been authorized to expend no hours under the contract from January to present) or as a requirements contract (from January to the present, the

Government has no requirements to be satisfied under the contract). The contractor contends that it remains ready to perform under the contract, has continued to satisfy all of its obligations while remaining ready to drive and service the vehicle, and is entitled to payment at driver rate and time and materials (including lodging and per diem) for the full option year. The contractor maintains that the Government's present interpretation is inconsistent with the plain language of the contract and the interpretation revealed in a Government proposed contract modification, rejected by the contractor. In the proposed amendment, the Government sought to amend the contract by expressly stating that the vehicle may not be operational for up to a 4 to 8 week period, with the Government to provide 30 days advance notice for this period. The proposed change was to occur with no price adjustment. No such modification would be necessary given the present interpretation proffered by the Government.

The contract has not been terminated for the convenience of the Government. Payment under that clause is not at issue. The Government has required the contractor to ensure that a driver is available for the duration of the option year with notice of 14 days. The Government's proposed interpretation fails to give meaning to various contract provisions, and results in the Government providing no consideration for the contractor maintaining driver availability during the option year as it satisfies other contractual obligations. The Government sought prices based upon a driver being available full-time for each year (base and option) of the contract, apparently for 48 weeks. The contract does not indicate that the contractor will receive the weekly rate only when satisfying requirements of the Government. Language in the time and material provisions is specific and addresses hourly, not weekly, rates. The only hourly rates are those for driver overtime. That is, the time and materials aspects of the contract do not apply to the weekly rate for the driver. The language and pricing in the contract do not reflect a requirements contract. There is no language identifying this as a requirements contract; there is no minimum guarantee; the contractor is responsible for having a driver available on a full-time basis (while maintaining insurance and satisfying other contractual responsibilities); the paid leave language is dependent upon each month of the contract, not the number of weeks or hours worked; the quarterly paid trip home is not dependent upon the number of weeks or hours worked; and the Government-proposed amendment indicates that the contracting officer was not interpreting the contract as now suggested by the Government.

A reasonable reading of the contract exists that gives effect to the various clauses. The contract is to be interpreted as follows. Under the fixed-price time and materials contract, the Government is obligated to pay the contractor an agreed upon weekly driver rate for a minimum of 48 weeks of the option year, as well as incurred time and material costs as described in the contract. The driver rate, as amended, is not dependent upon the actual hours worked under the contract; the contractor is entitled to payment for the driver. During the period in question, no hourly rates, as referenced in the contract clauses, have accrued. That is, there are no overtime hours for which payment is to be made. Material costs, stated to include lodging, per diem and maintenance costs, are not being incurred when the contractor is not driving (or otherwise assisting with) the vehicle. The contractor has identified no entitlement to material costs incurred for the period in question.

With this interpretation, the parties will attempt to determine the amount of compensation to be paid the contractor under the contract.

DECISION

In accordance with the request of the contractor and Government, this matter is hereby resolved and removed from the Board's docket.

JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
March 30, 2006